

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ROBERT W. SULLIVAN AND
JAN SULLIVAN dba CROWN
CEDAR PRODUCTS,

Appellants,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB Nos. 78-132 and 78-180

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of three \$250 civil penalties for smoke emissions allegedly in violation of respondent's Section 9.03(b) of Regulation I came on for hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, convened in Seattle, Washington on September 18, 1978. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellants appeared by their attorney, Craig V. Wentz. Respondent

WAH/LB

1 appeared by its attorney, Keith D. McGoffin. Reporter Marilyn Hoban
2 recorded the proceedings.

3 Witnesses were sworn and testified. Exhibits were examined.
4 From testimony heard and exhibits examined the Pollution Control
5 Hearings Board makes these

6 FINDINGS OF FACT

7 I

8 Respondent pursuant to RCW 43.21B.260 has filed with this Board
9 a certified copy of its Regulation I containing respondent's regulations
10 and amendments thereto of which official notice is taken.

11 II

12 Appellants own and operate a wood-waste burner on their property
13 at 428th Avenue S.E. and S.E. Reinig Road in North Bend, from which
14 certain emissions were observed.

15 III

16 At the following dates and times, respondent's inspector
17 observed smoke coming from appellants' waste wood burner at the
18 following density or opacity and for the following periods of time:

19 April 18, 1978

20 Time: 3:12 p.m.
21 Color: Gray Smoke
22 Density: No. 2-1/2 - 4 Ringelmann
Duration: Seven consecutive minutes

23 May 10, 1978

24 Time: 1:11 p.m.
25 Color: Blue smoke
Opacity: 40-60%
Duration: Six consecutive minutes

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER

June 29, 1978

IV

V

VI

FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

(Nos. 3815, 3835 and 3908) respondent has assessed \$250 for each of the three days involved. From these penalties, appellant appeals.

The appellants have a lengthy record of violations of the respondent's Regulation I.

VI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Pollution Control Hearings Board comes to these.

CONCLUSIONS OF LAW

I

Appellants urge that service of the Notice of Violation was untimely in each case, and therefore deprived appellants of their opportunity to prepare rebuttal evidence. We disagree.

Respondent's Section 3.21(a) authorizes service of notice of violation by certified mail. In these instances, respondent mailed such notice of violation to appellants within the same day that the alleged violative emission occurred. We conclude that such notice is timely even under the rule announced by another state in Air Pollution Board v. Western Alfalfa, 9 ERC 1236 (Colorado Supreme Court, 1976). In that case, cited by appellants, the court did not require contemporary notice of violation, but ruled that notice two weeks after violation was untimely. It then held that notice "within a reasonable time" was necessary to basic fairness. We conclude that the notice given in these matters was timely and consistent with basic fairness. We reserve to future cases the question of whether notice may be

FINAL FINDINGS OF FACT,
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1 fatally "untimely" and, if so, the lapse of time necessary to make
2 it so. We note in passing that Western Alfalfa, supra, focused
3 on the appellants' opportunity to note weather conditions which
4 affect the accuracy of the inspectors observation of a visible
5 emission. An appellant may obtain objective, localized weather
6 information from those agencies that record it, and may examine the
7 inspector regarding weather or other factors in any proceeding
8 before us. For this reason, service of a Notice of Violation by mail
9 on the day of observation is not fatal to the appellants' opportunity
10 to gather meaningful rebuttal evidence.

11 II

12 Appellants have not shown that respondent selectively enforces
13 its regulations against appellants.

14 III

15 Appellants have not shown on this record, that respondent's visible
16 emission standards cannot be met under available technology. If
17 this were true in appellants' individual circumstances, the sole means
18 of establishing this, in the first instance, would be by application
19 for a variance presented to the respondent's Board of Directors.
20 (See RCW 70.94.181 and Article 7, Regulation I which set forth the
21 exact standard for an air pollution variance.)

22 IV

23 Respondent's visible emission standards are not vague and
24 incapable of reasonable definition. A person of common intelligence
25 need not guess at the meaning of what is prohibited, namely; emission
26 of an air contaminant for:

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 ". . . more than three (3) minutes in any one
2 hour, which is:

3 (1) Darker in shade than that designated
4 as No. 1 (20% density) on the Ringelmann
5 Chart, as published by the United States
6 Bureau of Mines; or

7 (2) Of such opacity as to obscure an
8 observer's view to a degree equal to or
9 greater than does smoke described in . . .

10 (1) . . ." Section 9.03(b), Regulation I.

11 The Washington Supreme Court has held:

12 "The Ringelmann Smoke Chart has been widely
13 accepted throughout the United States as a
14 measurement of air pollution by both
15 legislatures and courts, and we find
16 ourselves in agreement with the wisdom
17 of this acceptance." Sittner v. City
18 of Seattle, 62 Wn.2d 834, 836 (1963).

19 V

20 The appellants violated respondent's Regulation I, Section
21 9.03(b) on April 18, May 10 and June 29, 1978. The \$250 civil
22 penalty assessed therefor is reasonable in amount and in light
23 of the purposes of the Washington Clean Air Act and, under the
24 circumstances of this case, should be affirmed.

25 Concerning the events of June 29, 1978, appellant's telephone call
26 to respondent was made to take advantage of respondent's Section 9.16
27 which states:

28 Emissions exceeding any of the limits established
29 by this Regulation as a direct result of start-ups,
30 periodic shutdown, or unavoidable and unforeseeable
31 failure or breakdown, or unavoidable and unforeseeable
32 upset or breakdown of process equipment or control
33 apparatus, shall not be deemed in violation provided
34 the following requirements are met:

35 (1) The owner or operator of such process
36 or equipment shall immediately notify the Agency of
37 such occurrence, together with the pertinent facts

38 FINAL FINDINGS OF FACT,
39 CONCLUSIONS OF LAW AND ORDER

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1 relating thereto regarding nature of problem as well
2 as time, date, duration and anticipated influence on
emissions from the source.

(2) The owner or operator shall, upon the
3 request of the Control Officer, submit a full report
4 including the known causes and the preventive measures
to be taken to minimize or eliminate a re-occurrence.

5 We have previously held that notice capable of invoking this
6 exculpatory provision must be immediate, that is, "instantly and
7 at once". U.S. Navy v. PSAPCA, PCHB No. 78-28. A total lapse
8 of 24 minutes from the first observed excess emission until
9 notification did not constitute immediate notice, and appellants
10 therefore violated Section 9.03(b) on June 29, 1978. Nevertheless,
11 because appellants voluntarily notified respondent of the excessive
12 emissions the civil penalty should be remitted under the facts of
(this case. The Board encourages the voluntary notification embodied
14 in respondent's Section 9.16.

15 VI

16 Any Finding of Fact which should be deemed a Conclusion of
17 Law is hereby adopted as such.

18 From these Conclusions the Board enters this


19 ORDER

20 Each violation is affirmed, provided however, that the two
21 \$250 penalties (Nos. 3815 and 3835) of April 18 and May 10, 1978,
22 are each hereby affirmed while the \$250 penalty (No. 3908) of
23 June 29, 1978, is hereby entirely remitted.

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26 FINAL FINDINGS OF FACT,
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AND ORDER

1 DONE at Lacey, Washington this 29th day of November, 1978.

2 POLLUTION CONTROL HEARINGS BOARD

3 
4 DAVE J. MOONEY, Chairman

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6 CHRIS SMITH, Member

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26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW
AND ORDER

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Pollution Control Hearings Board
By _____

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF KING

In the matter of the Pollution)
Control Hearings Board Order)

ROBERT W. SULLIVAN and JAN)
SULLIVAN d/b/a CROWN CEDAR)
PRODUCTS,)

Petitioners,)

vs.)

PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)

Respondent.)

No. 78-132 and 78-180

PETITION FOR JUDICIAL REVIEW

COMES NOW ROBERT W. SULLIVAN and JAN SULLIVAN d/b/a CROWN
CEDAR PRODUCTS, petitioners herein, and pursuant to RCW 34.04.130
and to RCW 43.21B.190, respectfully show the court that

I.

Petitioners are residents of King County, State of Washington.

II.

Petitioners have elected to lay venue in King County in
accordance with the express provisions therefor contained in the
Administrative Procedure Act, RCW 34.04.130(2).

III.

The Pollution Control Hearings Board (hereinafter "Board")
is an administrative agency of the State of Washington, having
been established by RCW 43.21B.010.

IV.

Petitioners are the appellants in the contested proceeding
before the Board wherein petitioners pray for an order striking

PETITION FOR JUDICIAL REVIEW

KELLER, JACOBSON, HOLE, JACKSON & WENTZ

1 and invalidating certain conditions and two \$250 civil penalties
2 imposed by the Puget Sound Air Pollution Control Agency.

3 V.

4 A hearing was held by the Board on September 13, 1978.

5 VI.

6 On November 29, 1978, the Board entered a decision, a true
7 and correct copy of which is annexed hereto and incorporated as
8 Exhibit "A".

9 VII.

10 Petitioners' request for review was heard by two members
11 of the three-member Board. The Board entered a final decision
12 and order in which these two members concurred. Pursuant to the
13 Board's procedural rules, WAC 371-03-200, such final decision
14 and order is a final decision for purposes of judicial review.

15 VIII.

16 The Board's final decision of November 29, 1978, has
17 prejudiced petitioners' substantive rights and petitioners are
18 aggrieved thereby.

19 IX.

20 Petitioners hereby petition the above-captioned court for
21 a review of the Board's Findings of Fact, Conclusions of Law,
22 and Final Order on the grounds that they are:

- 23 1. In violation of constitutional provisions;
- 24 2. In excess of the statutory authority or jurisdiction
25 of the Board;
- 26 3. Made upon unlawful procedure;
- 27 4. Affected by errors of law;
- 28 5. Clearly erroneous in view of the entire record as
29 submitted and the public policy contained in the act;
- 30 6. Arbitrary and capricious because the Findings of
31 Fact were inadequate to justify the Board's Conclusions
32 of Law and Order.

31 PETITION FOR JUDICIAL REVIEW

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WHEREFORE, Petitioners pray that:

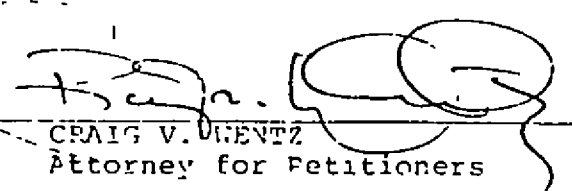
(1) This court proceed to review the decisions of the Board in the manner provided in RCW 34.04.130 and in RCW 43.213.10

(2) The court modify the Board's final order so as to render it consistent with the applicable laws and public policies of the State of Washington, or, to strike the final order in its entirety.

(3) The court grant such other and further relief as it deems just and proper.

KELLER, JACOBSON, HOLE, JACKSON & WENTZ

BY:


CRAIG V. WENTZ
Attorney for Petitioners